United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,377

MELVIN LOMAX,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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On Appeal from a Judgment
of the United States District
Court for the District of
Columbia

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STATEMENT OF QUESTIONS PRESENTED

1. Is appellant's conviction for robbery as an aider and abettor supported by substantial record evidence?

2. Was the court's charge to the jury on aiding and abetting erroneous when the court failed to instruct the jury that an aider and abettor must act in concert with the criminal in the commission of the crime -- not in some innocent activity -- and that mere presence even if coupled with guilty knowledge, without some act to forward the crime, would not constitute aiding and abetting?

3. Where there was a critical question as to whether the testimony showed that appellant struck the victim, was the appellant substantially prejudiced and deprived of a fair trial by the prosecutor's statement in his summation to the jury that appellant struck the victim and, despite appellant's objections to that statement, by the judge's remark to the jury: "My recollection was as stated by the District Attorney."?

4. Where the evidence showed that appellant did not take money from the victim and where appellant was not tried as an accessory after the fact but as a principal, should the six one-dollar bills seized from appellant have been suppressed and did their introduction into evidence constitute substantial error?

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TABLE OF AUTHORITIES

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The proceeding below was a criminal prosecution under D.C. Code §22-2901 (Robbery). The United States District Court for the District of Columbia entered judgment and verdict against appellant on January 3, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1291.

STATUTES INVOLVED

D.C. Code §22-2901:

"Robbery.

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, §810)"

D.C. Code §22-105:

"Persons advising, inciting, or conniving at criminal offense to be charged as principals.

"In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, §908)"

D.C. Code §22-106:

"Accessories after the fact.

"Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than twenty years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than one-half the maximum fine or imprisonment, or both, to which the principal offender may be subjected. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, §909)"

STATEMENT OF POINTS

1. Since the record contains no evidence that appellant forwarded the commission of robbery, the court should have granted a motion for a judgment of acquittal.

2. The court should have instructed the jury that mere presence and guilty knowledge, without some act to forward the crime, was not enough to constitute aiding and abetting.

3. The prosecutor's material misstatement of the testimony in his summation to the jury, aggravated by the court's statement to the jury: "My recollection was as stated by the District Attorney," in response to appellant's objections, substantially prejudiced appellant and deprived him of a fair trial.

4. The money seized from appellant should have been suppressed; its introduction into evidence substantially prejudiced appellant and deprived him of a fair trial; therefore, upon appellant's motion, a mistrial should have been declared.

STATEMENT OF THE CASE

Melvin Lomax, appellant herein was tried and convicted, as a principal, for robbery of six dollars and was sentenced

to imprisonment for two to six years.

1. Proceedings Below

Appellant was arrested, without a warrant, on September 3, 1963, together with Paul Jones, Jr. Lomax and Jones were indicted by the grand jury for robbery.

In support of a motion, heard on November 18, 1963, to suppress as evidence six one-dollar bills seized from the person of Lomax, the testimony of Lomax was taken (Vol. I, Tr. 5-6). Appellant stated that on September 3, 1963, he was walking south on 7th Street, N.W., was joined by Jones at the corner of 7th and K Streets, where they turned east on K Street. In the middle of the block Jones bumped into a man, Mr. Peay, the complaining witness. Both Jones and Peay fell to the ground. Lomax continued walking. Then the men got up from the ground, and Jones rejoined Lomax. They crossed 6th Street, turned left (north) on 5th Street, and then were halted by a policeman. The policeman asked them if they robbed a man which they denied. The policeman took Jones and Lomax to the Second Precinct where they were searched. Lomax had $6.98 in his pocket. Of this sum, the police took $6.00 and permitted Lomax to keep the change. Lomax was never told why he was arrested (Vol. 1, p. 10).

The prosecution called Patrolman Carrington Hayes of the Second Precinct, Metropolitan Police Department, to the stand. Hayes testified (Vol. I, Tr. 10-20) that on September 3, 1963, as he was walking his beat on 6th Street and reached K Street, two unknown men approached him and reported that they saw three men commit a robbery. Hayes saw Peay get up from the ground and brush his pants. In answer to his question as to where the robbers went, the two witnesses pointed after Lomax and Jones who were just rounding the corner from K Street, to 5th Street. Hayes ran after them, and shouted "Halt"; the men stopped, facing each other, and Lomax put something into his pocket. In response to his question, the men denied that they had committed robbery. Hayes searched the men and found money in the pocket of Lomax. He found no money on Jones. Hayes stated that he took the men back to Peay, who identified them on the street as the men who robbed him (Vol. I, p. 12). However, he had no conversation with the complaining witness prior to the arrest of Lomax (Vol. I, p. 15) whereas he arrested Jones only after he talked to Peay on the street (Vol. I, p. 17). Hayes also testified that the witnesses (who did not appear for testimony on the motion) told him that three men were involved in the robbery (Vol. I, Tr. 13); but that the

complaining witness said he was knocked down by two men (Vol. I, Tr. 19). Hayes further stated that Peay said that before the robbery he had six one-dollar bills in his possession (Vol. I, Tr. 19).

Thereupon, Judge Curran denied the motion to suppress the six one-dollar bills seized from Lomax.

At the joint trial held on November 21, 1963, before Judge Richmond B. Keech of the United States District Court for the District of Columbia, the prosecution called as its witnesses Peay, the complaining witness, Campbell and Bunyon, two eyewitnesses, and Patrolman Hayes, the arresting officer. The defendants also testified on their own behalf. Counsel summed up on November 21, and on November 22, 1963, the court charged the jury. The jury returned a verdict of guilty as charged as to both defendants. Each defendant was sentenced to imprisonment for two to six years. This appeal, by Lomax, followed.

2. Testimony of Witnesses

At the trial, the complaining witness, Forrest L. Peay, testified (Tr. 4-30) that on the morning of September 3, 1963, he took a check for $80 from his home at 414 K Street, N.W. to get it cashed (Tr. 9). Mr. Peay had no money before having his check cashed (Tr. 10). In the liquor store Mr. Peay received $80 in ten or twenty dollar bills. Mr. Peay

One of the three men turned up 6th Street; the other two continued walking down K Street. Mr. Campbell identified Mr. Peay as the man who was knocked down. Then the prosecuting attorney asked "Now do you see anybody in this courtroom who assaulted Mr. Peay on September 3rd?" Campbell answered in the affirmative and pointed both to Jones and Lomax (Tr. 34). Then the following crucial testimony followed (Tr. 35):

Q What did you see the defendant Jones do?

A I seen him reach his hand into the Complainant Peay and take his money.

Q Did you see who knocked Mr. Peay down?

A Yes, I did.

Q Who was that?

A The other fellow, which is not here, was the first one, and this was the second one.

Q Did you see whether or not Mr. Jones hit Mr. Peay?

A No.

Q Did you see, or did he?

A He did not hit him.

On cross-examination by Jones' attorney, Campbell stated that Lomax did not bump into Mr. Peay; "the other fellow who is not here bumped into him." (Tr. 36). He also identified Jones as the one who put his hand in Mr. Peay's pocket.

Jerry Nathaniel Bunyon testified that on the morning of September 3, 1963, he was engaged, together with Campbell, in loading a truck in the middle of the 600 block of K Street. At about 11 a.m. ". . .across the street I seen [sic] a fellow hit a fellow. Three of them together. Then he hit a fellow and knocked him down, and taken some money out of his pocket, and went back down 6th Street." (Tr. 44). He identified Peay as the person who was hit and identified Jones and Lomax as two of the three persons who were together. (Tr. 45). Bunyon testified that Jones hit Peay and removed some money from Peay's pocket. Bunyon further testified that the third man who was not on trial hit Peay the second time. Bunyon stated that Lomax was present "standing kind of around," but he did not observe Lomax doing anything (Tr. 46-47). After this affray the defendants walked down 6th Street toward K Street. "They were walking fast counting the money between the two of them." (Tr. 47-48). The third man made a left turn and went north on 6th Street and must have passed the police patrolman walking in the opposite direction. Bunyon and Campbell stopped the officer on the corner of 6th Street and reported what they saw. Campbell accompanied the policeman who ran after the defendants while Bunyon went to Mr. Peay and helped him stand up. Bunyon told Peay that "the officer and Mr. Campbell have gone

to catch the two men who had taken his money." (Tr. 49). Later Bunyon joined Campbell and they went to the Second Precinct to make a report.

The testimony of Policeman Carrington C. Hayes of the Second Precinct, Metropolitan Police Department, was substantially the same as was his testimony in opposition to the motion to dismiss. During the trial he also identified six one-dollar bills (Government Exhibits 1a, b, c, d, e and f) as the money he took from defendant Lomax. At one point he stated that he arrested the men after Peay identified them in the street and before they went to the precinct (Tr. 59). He also testified that he searched the defendants and found money on one of them before he marched them back to Peay for identification. At the precinct Hayes filled out a Police Department Form 163, a report, stating that "the complainant said he was beaten and robbed by one of two Negro males." (Tr. 64-65). A transcript of that report on Police Form 251, completed by the station clerk, also stated that "the complainant said he was beaten and robbed by one of two." (Tr. 65).

After the prosecution rested and after the court denied the various defense motions, defendant Jones took the stand. Jones denied the crime and said that he and Peay collided in the street accidentally; that both of them fell on the

ground; that Jones stood up and continued walking. According to Jones, Lomax kept right on walking and that Jones caught up with Lomax at the corner of 6th and K Streets where they waited together for the red light to change.

Appellant, Lomax, also took the stand and his testimony was substantially the same as his statement on the motion to dismiss. Lomax also testified that on September 2, 1963, he made $10; that on September 3, 1963, he still had $6.98 remaining from those earnings; that on the morning of the 3rd he hoped to find work at the corner of Georgia and Alaska Avenues; that being unable to find work there he walked down from Georgia Avenue and on 7th Street; that he met Jones on the corner of 7th and K Streets where they proceeded together west on K Street. Lomax also testified that while he knew Jones by name they were not social friends (Tr. 84). Lomax saw Jones and Peay bump into each other and fall down but Lomax continued walking "because I didn't want to get involved in no kind of trouble or nothing." (Tr. 85). Lomax stopped at the corner of 6th and K Streets where he stopped to wait for the light. This is where Jones caught up with him. (Tr. 86). They walked together to 5th Street, turned left, and soon afterwards were halted by the police. According to Lomax the officer did not take him back to confront Mr. Peay and

he only saw Peay at the precinct. Lomax did not take money from Peay (Tr. 87) and he did not know whether or not Jones took any money from him. (Tr. 88). Lomax also said that Jones gave him no money (Tr. 88).

SUMMARY OF ARGUMENT

I

Since the prosecution does not contend that appellant committed all the elements of robbery and since the court instructed the jury on aiding and abetting, it is obvious that appellant could have been found guilty of robbery only as an aider and abettor. An aider and abettor must do something to forward the commission of the crime before or while it is being committed.

The trial judge denied a motion for a judgment of acquittal by appellant because he believed that there was testimony showing that while the victim was assaulted and robbed by another defendant, appellant also struck the victim -- a fact which the victim himself denied. However, the record is devoid of any evidence from which the jury could have concluded, without a reasonable doubt, that appellant thus aided or abetted the commission of robbery. A review of the critical portion of the testimony shows that a witness, in response to a question as to who struck the victim, answered: "The other fellow, which is not here, was the first one, and this was the second one," but the record does not show which of the two defendants, if any, the word "this" meant to indicate. Therefore, either the

judge's recollection was erroneous or the record is too deficient to prove him right. The court's other reasons for denying the motion related to evidence of appellant's actions after the crime from which the jury could not have concluded, without a reasonable doubt, that appellant did something to forward the commission of the crime before or while it was committed. Thus, while there was evidence which tended to show that appellant possessed the money taken from the victim, which evidence may have supported appellant's conviction as an accessory after the fact, such evidence could not support his conviction as an aider and abettor.

II

The court's instructions to the jury on aiding and abetting were erroneous and incomplete because the jurors were not told that mere presence and guilty knowledge on the part of appellant would not suffice for a conviction as an aider and abettor unless they were also convinced beyond a reasonable doubt that appellant was doing something to forward the crime -- that he was a participant rather than a spectator. Therefore, even if the evidence would have been sufficient to support the verdict, the verdict was returned on improper and incomplete instructions.

III

Since the question as to whether there was evidence showing that appellant hit the victim was crucial and had already been disputed in a bench conference and motion, the prosecutor's statement in his summation to the jury that appellant struck the victim was prejudicial error which deprived appellant of a fair trial. This error was further compounded when, upon defense counsel's objection to the prosecutor's remarks, the court stated to the jury: "My recollection was as stated by the District Attorney." In light of the circumstances, the judge's statement that his and counsel's recollection of the evidence was not binding on the jury, did not cure this prejudicial error.

IV

Even assuming that the six one-dollar bills seized from appellant were the fruits of Jones' crime, their possession by Lomax after the crime, (while admissible if appellant were charged as an accessory after the fact), was not admissible as evidence to show that appellant aided or abetted robbery, in the absence of other evidence -- never

forthcoming -- connecting Lomax with the crime as an aider or abettor. The prejudicial effect of such inadmissible evidence, whose probative value on the offense for which Lomax was tried was nil, deprived appellant of a fair trial. The money should have been suppressed as evidence and, after its introduction into evidence, appellant's motion for mistrial should have been granted.

ARGUMENT

I. THE COURT ERRED IN REFUSING TO DIRECT A JUDGMENT OF ACQUITTAL SINCE THE RECORD CONTAINS NO EVIDENCE UPON WHICH THE JURY COULD REASONABLY HAVE CONCLUDED THAT APPELLANT WAS GUILTY OF ROBBERY.

With respect to Point I, appellant desires the Court to read the entire transcript of testimony, Tr. 1-94 and particularly Tr. 34-35 and Tr. 68-71.

In a jury trial, the trial judge cannot decide on the evidence whether the accused is guilty or innocent, because the jury is charged with making that decision upon proper evidence and instructions. However, if there is no evidence on which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, a motion for a directed verdict of acquittal must be granted. The reason for that rule is that the trial judge must not allow the jury to speculate guilt without evidence or to stray into pure surmise, or into a verdict based on bias or prejudice.

Curley v. United States, 81 U.S. App. D.C. 389, 160 F. 2d 229 (D.C. Cir. 1947). In the instant case, the evidence was insufficient to sustain a robbery conviction of the appellant.

Under the D.C. Code, one who aids and abets the commission of a crime is to be charged as a principal.[1/] The question here is whether there was sufficient evidence introduced by the Government to show that Lomax aided and abetted the commission of robbery on Peay, on September 3, 1963.

A meticulous analysis of the relatively brief trial record shows that, taking the evidence in the light most favorable to the prosecution, Lomax was merely a passive witness of a crime committed by another at the spur of the moment. The victim, Peay, testified not only that Lomax did not hit him or touch him but emphatically repeated that Lomax did nothing; he just stood there while the crime was being committed by defendant Jones. One of the eyewitnesses,

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1/ D.C. Code, §22-105: "In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding and abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be."

Bunyon, testified that the victim was hit and that money was removed from the victim's pocket, but that neither of these acts were committed by Lomax. Lomax was merely present. The arresting officer's report shows that he was told that the victim was assaulted and robbed by defendant Jones, not by Lomax.

The uncontroverted testimony concerning the events leading up to the commission of the crime also confirm the claim, supported by the testimony of the victim and the other eyewitness, Bunyon, that Lomax did not aid or abet the commission of the robbery. This testimony shows that Lomax met Jones by chance a half a block from the scene of the crime; that they decided to go together to seek employment; that the victim walking in the opposite direction suddenly emerged; that the encounter of the victim and Jones was sudden and spontaneous. This crime was the result of the fortuitous, sudden and unexpected opportunity; it is not the type of crime which requires or reflects any advance planning. In fact, its casual and spontaneous execution by Jones left no time for involving Lomax.

And while it is recognized that on appeal of a conviction the evidence must be read in the light most favorable to the prosecution, a warning about the witnesses' indiscriminate use of plurals, clarified by their own testimony, seems appropriate. For instance, the complaining witness, Peay, when asked to recount what happened, answered (Tr. 5): ". . . they twist my wrist and stole my money," although seconds earlier, he testified that he was attacked by only one man (Tr. 5) and later pointed out Jones as his sole attacker (Tr. 6). At another point, the same witness testified (Tr. 30): "They just walked up to me and knocked me down." Yet, extensive and detailed prior testimony makes it clear that only Jones knocked him down and that the witness slipped into the plural only by careless imprecision. Viewed in its entirety, the testimony of Peay, the complaining witness, clearly shows that Lomax did not touch him at all.

The careless plurals were also employed by the other witnesses. For example, witness Campbell first said (Tr. 32): ". . . we saw three men who knocked down one man and robbed him of some money. . .", whereas his subsequent testimony, confused as it may be, clearly shows that this is not really what he meant or what he saw. Testimony that

after the robbery the two defendants "were walking fast counting the money between the two of them" (Tr. 47-48) is the result of the same phenomenon of careless plurals. Compare, e.g., Tr. 36-37 which shows that Jones, alone, was counting the money.1/

There is a discrepancy between the testimony of the eyewitnesses and of the victim as to whether there was a group of two men (Jones and Lomax) or a group of three men (Jones, Lomax, and a third man, who got away and did not stand trial) walking together at the scene and at the time of the crime. There is some confusion as to the role of the third man, whether he also hit the victim, Peay. Peay himself testified that there was no "third man," only Jones and Lomax, and that Jones was the one who knocked him to the ground, twisted his arm and removed money from his pocket while Lomax did nothing. The eyewitnesses state that the third man also struck Peay. Campbell testified that the third man struck Peay first while Bunyon testified that the third man struck Peay for the second time. Peay remembers two blows both administered by Jones.

1/ For the frequent colloquial use of "they" with a vague or even a singular reference, see Partridge, A Dictionary of Slang and Unconvential English (5th Ed. 1961), p. 874; Evans & Evans, A Dictionary of Contemporary American Usage (1957 Ed.) p. 509; and Partridge, Usage and Abusage (Penguin Ed.1963), p. 332.

In any event, despite this unexplainable conflict, the testimony of all witnesses is unanimous and clear in all parts of the record (except for the two pages later pointed out here) that Lomax neither hit Peay nor removed money from his pocket. The passive Lomax not only failed to offer "force and/or violence," not only failed to touch the victim, but there is no evidence whatsoever that he did anything at all to encourage or to assist, or to even be ready to assist, Jones in the robbery.

Therefore, quite properly, Lomax's defense counsel, in a bench conference held after the Government's conclusion of its case, moved for a judgment of acquittal (Tr. 68). The court, however, believed that "One of the witnesses did say this man on this end, Lomax, did strike him the second time." (Tr. 68) And upon the insistence of Lomax's counsel, that his recollection was to the contrary, the court said: "I am human like you. The record will speak for itself." The court further stated: ". . . I still rely on the record. You have in addition to that the rapid departure from the scene, and the fact that they are there seen together counting money, the spoils. The other man put him in the position where he could be deemed by the jury to be guarding over it. I think it is sufficient to go under

the Curley case, Mr. Kramer, I will therefore deny your motion."

Thus we reach pages 34 and 35 of the transcript, to which the trial court had obvious reference.1/ Therein lies the following direct testimony of witness Campbell, who was one of the men who watched the encounter from across the street:

Q Now do you see anybody in this courtroom who assaulted Mr. Pyeay on September 3rd?

A I do.

Q Who do you see?

A One there and one there. (Pointing)

Q Sir, you pointed to two men. Would you describe what the first man you pointed to is wearing? What is he wearing today?

A He is wearing a green jacket, and a yellow shirt.

Q And you pointed to another man. What is he wearing?

A He is wearing a gray shirt with a yellow collar.

Q The first man that you pointed to, what did you see him do?

THE COURT: I think we better identify for the record.

1/ The remainder of the transcript is clear and unanimous on Lomax's passivity, with all witnesses, including the victim, repeatedly stating that Lomax did nothing.

Who is that? Jones?

MR. SIDMAN: The first man is the defendant Jones. The second man is the defendant Lomax.

BY MR. SIDMAN:

Q What did you see the defendant Jones do?

A I seen him reach his hand into the Complainant Peay and take his money.

Q Did you see who knocked Mr. Peay down?

A Yes, I did.

Q Sho was that?

A The other fellow, which is not here, was the first one, and this was the second one.

Q Did you see whether or not Mr. Jones hit Mr. Peay?

A No

Q Did you see, or did he?

A He did not hit him.

Upon a quick reading of the above confusing portion of the transcript, one could gain the erroneous impression that when Campbell testified ". . . and <u>this</u> was the second one" he may have meant to indicate appellant by the demonstrative pronoun "this." A closer analysis of the testimony, however, raises such serious doubts that one must conclude

that either the jury was not provided with any evidence showing that appellant struck the victim, or the transcript is so deficient that the court, on appeal, is unable to determine whether any evidence thereof was taken.

It should be noted that when Campbell first identified two persons in the courtroom as the ones involved in the assault, he pointed to them saying "one there and one there" and later described the apparel which these persons were wearing at the trial. It was upon the court's insistence that the prosecuting attorney, not the witness, provided the defendants' names: "MR. SIDMAN: The first man is the defendant Jones. The second man is the defendant Lomax." (Tr. 35) After that identification, the prosecuting attorney asked Campbell what he saw Jones do. The answer was that "I seen [sic] him reach his hand into [sic] the Complainant Peay and take his money." Again, the prosecuting attorney, rather than the witness, supplied the the defendants' names. And then, upon further questioning, as to who knocked Peay down, Campbell said that "The other fellow, which [sic] is not here, was the first one, and this one was the second one." There being no indication in the record at this point whom Campbell meant when he said "this," the reasonable interpretation permits the inference

that it may have meant Jones (about whom the preceding questions were asked), Lomax, or anyone else in the courtroom.

One must keep this confused state of events in mind when passing on to the subsequent testimony. At that point, Campbell had not yet used the names of either defendants, whom he described by their clothes; only the prosecuting attorney had mentioned the defendants' names. By the demonstrative pronoun "this", Campbell indicated someone in the courtroom as the one who hit Peay for the second time and the inference (reasonable or not) is present from the record that he meant one of the defendants. However, Campbell did not connect the demonstrative pronoun with either defendant either by his own method of identification (by apparel) or by the prosecutor's method of identification (by name). Then, without establishing whom Campbell meant, and without establishing for the record that Campbell knew which name belonged to which set of clothes, the prosecutor asked whether Jones hit Peay and Campbell answered in the negative. Under the confused state of events in the record at this point, we can deduce only that Campbell (whom the record did not show as knowing which defendant was named Jones and which one Lomax) meant that one of the defendants did not hit Peay at all. On cross

examination, Campbell testified that Lomax did not bump into Peay and that Jones was the one who put his hand into Peay's pocket (Tr. 36). This further buttresses the presumption that the crucial demonstrative pronoun "this" did not indicate appellant Lomax. In any event, the record was never thereafter clarified, and there is not a shred of record evidence on which the jury could have concluded that Lomax ever touched Peay.

If the accusing demonstrative pronoun was in fact directed to Lomax, it was the duty of the prosecution, whose burden it was to prove Lomax guilty beyond a reasonable doubt, or of the court, whose obligation was to transmit a clear record on appeal, to have the fact clarified for the record.[1/] On the basis of the record filed on appeal, however, it cannot be concluded that there was any evidence in the record showing that Lomax hit Peay.

Without evidence that Lomax hit Peay, however, the record

1/ Cf. Crain v. United States, 162 U.S. 625, 644, wherein the judgment was reversed because the record did not show that the accused was arraigned:

> ". . . Nor ought the courts, in their abhorrence of crime, nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused are often prepared. Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken."

is completely barren of any evidence that Lomax had aided and abetted Jones in the commission of the crime in any fashion.

Since the common law distinction between accessories before and after the fact has been preserved by the D.C. Code,[1/] we must here be concerned only with the activities of Lomax, if any, before or during the commission of the crime. A working definition of aiding and abetting is given in "Jury Instructions and Forms," 27 F.R.D. 43, 54 as follows:

> In order to aid and abet another to commit a crime it is necessary that a defendant willfully associate himself in some way with the criminal venture; and that he willfully participate in it as in something he wishes to bring about; and that he willfully seek by some action of his to make it succeed. Nye & Nissen v. United States, 1949, 336 U.S. 613, 619, 69 S. Ct. 766, 769, 93 L. Ed. 919; United States v. Johnson, 1943, 319 U.S. 503, 518, 63 S. Ct. 1233, 1240, 87 L. Ed. 1546; Morei v. United States, 6 Cir., 1942, 127 F. 2d 827, 831; United States v. Peoni, 2 Cir., 1938, 100 F. 2d 401, 402.

This is substantially the same definition given in the classic case of United States v. Peoni, 100 F. 2d 401 (2d Cir. 1938) (L. Hand, J.).

Mere presence at the scene of the crime is not enough;

1/ D.C. Code §22-105 and §22-106. See also United States v. Johnson, 123 F. 2d 111 (7th Cir. 1941), reh. den. November 6, 1941.

even repeated association with criminals is insufficient to raise a question for the jury. In Davis v. United States, 107 U.S. App. D.C. 76, 274 F. 2d 585 (D.C. Cir. 1960), cert. den. 363 U.S. 806, the co-defendant Berry had repeatedly associated with another defendant who was found guilty of violating the lottery laws. Berry frequented the premises of a numbers counting place and was found to be present therein when the place was raided. This Court, reversing the judgment against Berry said: "While this evidence, standing alone, may be sufficient to raise the eyebrow of suspicion, it is insufficient to raise a question for the jury." 274 F. 2d at 588. See also Cooper v. United States, 94 U.S. App. D.C. 343, 218 F. 2d 39 (D.C. Cir. 1954).

Similarly, in United States v. Garguilo,[1/] G and M were inseparable friends, and G was in the habit of introducing M as his good friend with whom he did everything together as a group. M was with G virtually at every phase of G's preparation of counterfeit currency: when G approached the printer, the photographer, when he transported the photographs and when the first unsuccessful copies were burnt into the printer's plate. Evidence showed that M must have

1/ 310 F. 2d 249 (2d Cir. 1962).

known of G's criminal intent and of the nature of his unlawful activities. Yet, M's conviction as an aider and abettor was reversed. The court, relying on the definition of aiding and abetting rendered by Judge Learned Hand in United States v. Peoni, supra, stated:[1/]

> ". . .knowledge that a crime is being committed, even when coupled with presence at the scene, is generally not enough to constitute aiding and abetting . . . even in an age when solitude is so detested and 'togetherness' so valued, a jury could hardly be permitted to find that the mere furnishing of company to a person engaged in crime renders the companion an aider or abettor."

In the instant case, we find that there was no evidence showing that Lomax associated himself with the criminal venture, before or during its commission -- he merely associated himself with the person of Jones. Lomax did not participate in the commission of the crime. Nor is there any evidence that he encouraged or facilitated its commission by Jones. The fortuitous encounter between the victim and Jones occurred much too suddenly to leave time or room for the involvement of Lomax.

Passing on to the other reasons given by the court for denying the motion to acquit, we find that the court gave no instruction to the jury on flight from the scene

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1/ 310 F.2d at 253.

of the crime, as, indeed, the record would not have justified such instructions. Moreover, even if we assume, arguendo, that Jones and Lomax left the scene of the crime in a suspiciously hurried manner, it must be noted that such departure occurred, as it had to, after the commission of the crime. Yet, as it was established above, our inquiry here narrows down to Lomax' activities before or during the commission of the crime, because he was charged as a principal in his alleged capacity of an aider and abettor, not as an accessory after the fact. The same is also true of any evidence that the defendants may have counted money together after the incident.

Nor, for the same reason, need we concern ourselves here with whether or not the record under scrutiny would have supported appellant's conviction as an accessory after the fact. Accessories after the fact are guilty of a crime other than principals or persons aiding and abetting principals, and the former are to be punished by only half the penalty of the latter. D.C. Code, §22-106. If from evidence sufficient to convict one as an accessory after the fact the jury is permitted to infer guilt as an aider and abettor, the obvious legislative intent to try and punish these offenses separately and differently would be frustrated. Moreover, Lomax was not indicted or

charged as an accessory after the fact and, therefore, could not be tried or convicted for that crime. Cole v. Arkansas, 333 U.S. 196. Therefore, the motion for a directed verdict of acquittal should have been granted and the denial of that motion requires reversal.

II. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT TO FIND APPELLANT GUILTY AS AN AIDER AND ABETTOR THEY MUST BE CONVINCED, BEYOND A REASONABLE DOUBT, THAT APPELLANT DID SOMETHING TO FORWARD THE CRIME.

With respect to Point II, appellant desires the Court to read Tr. 129.

Assuming, arguendo, that there was some shred of evidence in the record from which the guilt of appellant could be inferred, (an assumption which appellant does not concede), the judgment must still be reversed because of the improper instructions of the court to the jury. The impropriety was committed by a lack of careful precision in the charge on aiding and abetting. This was particularly prejudicial where the evidence was at best marginal.

The court charged that the Government did not have to prove "that each defendant himself actually committed the offense, as long as the Government proved beyond a reasonable doubt that the defendant was acting in concert with one or more other persons who did so commit the offense." (Tr. 129) The error assigned here is that the court did not make it clear that by "acting in concert" it is meant "acting in concert in the commission of the crime." There is an obvious distinction between acting in concert with the criminal in innocent activities and in acting together with him in

committing a crime. Associating with a criminal, where this fact itself does not assist him in the commission of the crime, of course, is not a criminal offense. "Guilt by association is a discredited doctrine." Uphaus v. Wyman, 360 U.S. 72 (1959).

Subsequently, the judge further instructed: "Mere physical presence is not enough." (Tr. 129) But, in the sentence following, he stated: "To constitute an aider and abettor it is essential that the aider and abettor share in the criminal intent with the party who actually commits the crime." Here, again, the court failed to state that the presence and criminal intent must also be accompanied by some act on the part of the aider and abettor in promoting the commission of the crime.

Under these instructions, taken as a whole, the jury could have found Lomax guilty as an aider and abettor if it believed the following set of facts: That Lomax walked down the street together with Jones; that Jones robbed Peay while Lomax was present; that Lomax did nothing to assist Jones but that Lomax, deep inside him, although he did not communicate this wish, wished Jones to rob Peay or was pleased at his action. These facts would fit the court's

definition of aiding and abetting; it would include "acting in concert" (walking together) "with one who committed the offense" (Jones robbed Peay) and "sharing the criminal intent" (Lomax hoped Jones would be successful in robbing Peay although he did not communicate this wish by word or act). This, of course, is not the law. Knowledge that a crime is being committed, even coupled with presence at the scene and with the uncommunicated wish that it be committed, is not enough to constitute aiding and abetting. Davis v. United States, supra; Aikens v. United States, 98 U.S.App. D.C. 66, 232 F.2d 66 (D.C.Cir.1956); United States v. Garguilo, supra.

The circumstances in United States v. Garguilo, 310 F.2d 249 (2d Cir. 1962), discussed in Point I, supra, are very similar to the instant case, except that in Garguilo the association between the criminal and the alleged aider and abettor was a repeated one over a period of time. The court there held that if the evidence passed the test of sufficiency, it did so "only by a hair's breadth". . . "The closeness of the issue against Macchia [the alleged aider and abettor] imposed an obligation on the trial judge to instruct the jury with extreme precision, as he realized,

and us to review the charge with what, in a less doubtful case, would be undue meticulousness." 310 F.2d at 254.

And in reversing the judgment, the court in Guarguilo stated (310 F.2d at 255):

> Never were the jurors told in plain words that mere presence and guilty knowledge on the part of Macchia would not suffice unless they were also convinced beyond a reasonable doubt that Macchia was doing something to forward the crime -- that he was a participant rather than merely a knowing spectator.

The identical error committed in the court's instructions in the instant case also requires reversal here.

III. THE PROSECUTOR'S MATERIAL MISSTATEMENT OF FACT TO THE JURY, COMPOUNDED BY THE COURT'S COMMENTS ON CRUCIAL EVIDENCE, SUBSTANTIALLY PREJUDICED APPELLANT AND DEPRIVED HIM OF A FAIR TRIAL.

With respect to Point III, appellant desires the Court to read Tr. 97-98.

The prosecuting attorney, at the very beginning of his summation to the jury stated: "Both these defendants hit Mr. Peay. Witness Campbell saw the defendant Lomax strike him." (Tr. 97) Defense counsel interrupted Government counsel to correct that statement, and said: "My recollection is that every witness said that he [Lomax] did not strike him." Thereafter the court stated: "Ladies and gentlemen, that is not my recollection. My recollection

was as stated by the District Attorney." And then the judge continued with an explanation that, in any event, it was not the recollection of the court and the attorneys but the recollection of the jury which controls.[1/]

It must be remembered that, as discussed in Point I, the evidence which would have linked appellant to the crime was, at best, marginal and that, as discussed in Point II, the judge's instructions to the jury on the law of aiding and abetting were, at least under the circumstances, incomplete. Thus, in analyzing the question as to whether the judge's injection of his comments to the jury on his recollection of the evidence were so prejudicial as to warrant reversal, it should also be considered that the judge's remarks were directed to a crucial part of the testimony and that the record does not prove his recollection of that testimony to be correct.

1/ It should be kept in mind that, as was discussed in Point I, supra, the court and the defense counsel had already disagreed in a bench conference held outside of the hearing of the jury as to whether there was any evidence in the record showing that Lomax struck Peay. At the conclusion of that colloquy the court stated: "I am human like you. The record will speak for itself." (Tr. 68) This statement tends to indicate that the trial judge was not at all certain about his recollection of the testimony. It should further be remembered that regardless of whether or not the judge's recollection was in fact correct, the record, on which he relied, does not show it to be correct. See discussion on page 4, supra.

While the judge has the privilege to comment on the evidence, the Supreme Court held in Quercia v. United States, 289 U.S. 466 (1933), that this privilege has limitations. 1/ The Supreme Court there stated:

> In commenting upon testimony he [the judge] may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it . . . In the instant case, the judge did not analyze the evidence; he added to it and he based his instructions upon his own addition. . . . . Nor do we think that the error was cured by the statement of the trial judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it they should find the defendant not guilty.

Under the circumstances of the instant case, where the complaining witness as well as another witness for the prosecution testified in corroboration of appellant's claim, under oath, that appellant did not strike the complaining witness, the prejudicial remarks gain added significance. In declaring as a fact that appellant struck the complaining witness, the prosecuting attorney suggested not only that his own witnesses, by whose testimony he is bound, but also that appellant, Lomax, committed perjury. Such prejudicial remarks by the prosecutor on a vital portion of the evidence was held reversible error in Stewart v. United States, 94

1/ 289 U.S. at 470, 53 S.Ct. at 700.

U.S. App.D.C. 293, 247 F.2d 42 (D.C.Cir. 1957). See also, United States v. Spangelet, 258 F.2d 338 (2d Cir. 1958); Wallace v. United States, 281 F.2d 656 (1960), where misquotations or the attempt to place facts not actually presented in evidence by the prosecutors in their summations to the jury were held causes for reversal.

In Blunt v. United States, 100 U.S.App.D.C.355, 244 F.2d 355 (1957), this Court stated that when "it is the judge who undertakes to supplement the evidence, the harm is even greater than when the prosecutor does it, for 'the influence of the trial judge on the jury is necessarily and properly of great weight. . .'" The harm done could not be cured by the instructions to the effect that the jury being the judge of facts, the judge's recollection thereof does not bind them. Quercia v. United States, 289 U.S. 466 (1933); Blunt v. United States, 100 U.S. App. D.C. 355, 244 F.2d 355 (1957).

The factual misstatement of the prosecuting attorney in his summation, supported by the prejudicial remarks of the trial judge, substantially prejudiced and deprived the appellant of his constitutional right for a fair trial guaranteed under the due process clause of the Fifth Amendment.

IV. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A MISTRIAL BASED ON THE ERRONEOUS TAKING INTO EVIDENCE OF SIX ONE-DOLLAR BILLS AND IN DENYING APPELLANT'S MOTION TO SUPPRESS SUCH MONEY.

With respect to Point IV, appellant desires the Court to read Vol. I, Tr. 11-20, Tr. 23-25 and Tr. 52-67.

Defense counsel moved to suppress as evidence six one-dollar bills seized from appellant, and, this motion denied, moved for mistrial at the conclusion of the Government's case. The specific six one-dollar bills introduced into evidence by the prosecution were not identified as money which was taken from the complaining witness. It was merely identified as part of the money which was in the possession of the appellant after Jones' commission of the crime. Yet, generally, possession of money is no crime.[1/] Nor is possession of money by Lomax--even specific denominations of money claimed to be taken from a robbery victim[2/] who

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1/ We are not concerned with whether the proof of sudden wealth may be admissible--appellant's possession of $6.98 obviously does not fall into this category of suspicious circumstances.

2/ The identification of the exact amount and denomination of the money by the complaining witness, after all the currency taken from appellant was first identified as such and then carefully counted by the arresting officer and the precinct desk sergeant in front of the alleged victim, seems a rather artificial identification procedure.

clearly identified his robber as Jones--proper evidence to show that Lomax is an aider and abettor of robbery.

The Government's evidence clearly shows that Lomax took no money from the victim. Under these circumstances, the possession of money by Lomax, even if it were assumed, arguendo, that such money was the fruit of Jones' crime, was not admissible evidence to show that Lomax aided and abetted the robbery. It may have been admissible evidence were Lomax tried as an accessory after the fact. Yet, as pointed out before, Lomax was neither indicted nor tried and convicted as an accessory after the fact. Cf. Cole v. Arkansas, 333 U.S. 196.

It behooved the court, under such circumstances, to exclude evidence which did not support an element of the crime with which appellant was charged. At the very least, the court should have instructed the jury that it could draw no adverse inferences from the possession of the money by appellant on the charge in question.

Thus, while the probative value of the money as to the crime charged was nil, its prejudicial effect was substantial. It may have convinced the jurors that appellant somehow assisted Jones after the crime. Without proper

guidance from the court as to the vital distinction between an aider and abettor and accessory after the fact, this inadmissible evidence may have prompted the jury to decide to convict appellant of some crime. The jury, believing that appellant was an accessory after the fact, returned a verdict of guilty to whatever crime was charged. To prevent this miscarriage of justice the six one-dollar bills should have been suppressed or, at least, a mistrial should have been declared.

CONCLUSION

For the foregoing reasons it is respectfully requested that the judgment in this case be reversed.

Respectfully submitted,

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(Appointed by this Court)

Dated: April 4, 1964

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,377

MELVIN LOMAX, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
BARRY SIDMAN,
DAVID EPSTEIN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented on appeal:

1) Even assuming *arguendo* that the testimony did not show appellant to have struck the victim during the commission of the robbery, was evidence which showed that appellant 1) came upon the scene with the other two culprits who then beat and robbed the victim, 2) left the scene with co-defendant Jones who had the stolen money, and 3) minutes later, was found to have possession of that stolen money, sufficient to support a conviction of robbery under a theory of aiding and abetting in the commission of the crime?

2) Even assuming that the prosecutor and the court mistakenly recalled a piece of testimony, was the instruction which told the jury that its recollection of the testimony governed its deliberations sufficient to correct any such flaws in memory?

3) Were the court's instructions to the jury on aiding and abetting in the commission of the crime adequate?

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,377

MELVIN LOMAX, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed on September 30, 1963, appellant was charged with a one-count violation of Title 22, District of Columbia Code, Section 2901, robbery. After a trial by jury appellant and his co-defendant, Paul Jones, Jr., were both convicted. Both were sentenced by judgment and commitment filed on January 3, 1964, to a term of imprisonment of two (2) to six (6) years. (See Record.) This appeal followed.

At trial the Government presented the testimony of complainant Peay, two disinterested onlookers to the commission of the robbery, and the police officer who affected the arrest of appellant and co-defendant Jones.

During the morning, at approximately 11:00 a.m., of September 3, 1963, Forest L. Peay was walking to the barbershop and passed through the 600 block of K Street, Northwest (Tr. 5). Peay recalled that two men, appellant and co-defendant Jones appeared. The latter knocked Peay to the ground, twisted his wrist, and emptied complainant's pocket of six one-dollar bills. The amount of money taken was quite clear since Peay had earlier that morning cashed a check, paid his rent, and left all but six of the remaining dollars at home. While on the ground, Peay noticed appellant standing at his feet. He did not recall getting struck by appellant. (Tr. 5-9, 15, 16, 23.)

Joseph Campbell, who was loading a truck across the street during this time, observed the attack on Peay. Campbell saw three men approach the complainant. First, one man, who was not apprehended, bumped into the complainant and knocked him down (Tr. 33). The victim attempted to rise and was again knocked down. Co-defendant Jones then reached into Peay's pocket and took some dollar bills. (Tr. 33-36.) Appellant's active role was described in the following manner:

> By Mr. Sidman (the prosecutor):
>
> Q. Now do you see anybody in this courtroom who assaulted Mr. Peay on September 3rd?
> A. I do.
> Q. Who do you see?
> A. One there and one there. (Pointing.) (Tr. 34.)

The witness then described the wearing apparel of the two defendants in the courtroom. The testimony continued:

> By Mr. Sidman:
>
> Q. What did you see the defendant Jones do?
> A. I seen him reach his hand into the Complainant Peay and take his money.
> Q. Did you see who knocked Mr. Peay down?
> A. Yes, I did.
> Q. Who was that?

A. The other fellow, which is not here, was the first one, and this was the second one.
Q. Did you see whether or not Mr. Jones hit Mr. Peay?
A. No.
Q. Did you see, or did he?
A. He did not hit him. (Tr. 35.)

Appellant was the only other person implicated in the commission of the crime who was then present in the courtroom so that the statement "this was the second one" who knocked Peay down was an unmistakable reference to appellant and his role in the robbery.

Appellant and co-defendant Jones were then seen going down the street together. Jones was counting the money. The other assailant had departed alone and turned in a different direction (Tr. 36, 37).

Jerry Bunyon, who was similarly situated across the street, saw three men approach Peay. Co-defendant Jones was seen to hit the complainant around the head with a fist and then remove dollar bills from the latter's pocket. Bunyon did not see appellant strike any blows. The witness also stated that he did not "pay too much attention what he (appellant) was doing after I seen this fellow (co-defendant Jones) knock (Peay) down." (Tr. 43, 45, 46.)

Officer Carrington C. Hayes, who had just arrived at the corner of 6th and K Street, Northwest, was hailed by the two witnesses and briefly informed as to the robbery. Appellant and co-defendant Jones were pointed out as the culprits and arrested. Appellant was searched after the arrest and had six one-dollar bills in his possession. (Tr. 52-56.)

The defense

Co-defendant Jones stated that he and appellant were walking down the street when, quite accidentally, he bumped into complainant Peay. Both were thrown off balance and fell to the ground. Co-defendant Jones then arose, apologized for the mishap, and continued on his

walk, only to be arrested by the police a short time later. (Tr. 71-81.) Jones had no money when searched (Tr. 78).

Appellant stated that he met co-defendant Jones on the street, and they started walking together. Shortly thereafter, co-defendant Jones accidentally bumped into complainant Peay. Though Jones fell down, appellant continued walking "(b)ecause I didn't want to get involved in no kind of trouble or nothing." Appellant, when asked if he saw so-defendant Jones take any money from the complaining witness, replied, "Not as I know of, sir (Tr. 88.)"

Appellant denied the presence of any third person at the scene and explained the possession of the six one-dollar bills as earnings. (Tr. 81-93.)

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 22, District of Columbia Code, Section 105 provides:

> In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

SUMMARY OF ARGUMENT

The evidence is sufficient to support appellant's conviction of robbery. The testimony of one witness who saw appellant strike the victim during the commission of the crime is sufficient to support appellant's conviction as a principal in the robbery. Even assuming that the testimony does not show that appellant struck the victim, the evidence is still sufficient to support his conviction as an aider and abettor. The evidence showed that appellant came upon the scene with the other culprits, stood-by as a look-out or reserve force, left with one of the other robbers, and shared in the proceeds of the crime.

During closing argument the prosecutor recalled that one of the witnesses had testified that appellant struck the victim while the robbery was committed. The court had a similar recollection. Even if this were not an accurate recollection of the testimony, which it was, the court's instruction to the jury that its recollection of the testimony, not that of the court or counsel, governed the jury deliberations was sufficient to correct any possible flaws in memory.

The court's instructions to the jury on aiding and abetting, taken as a whole, were clear and accurate.

ARGUMENT

I. The evidence shows appellant's active participation in the commission of the robbery and supports the conviction.

(See Tr. 1-20, 32-37, 43-44, 46-48, 52-56, 68, 70, 97).

Three men swoop down the street, alight on a victim, knock him down, twist his arm, and rob him of six one dollar bills. Though the violence is sudden and swift, the witnesses have a distinct recollection of the events. Joseph Campbell viewed the robbery, which occurred in the middle of the morning, standing at a safe vantage point across the street from the actual site of the crime. He

stated that two persons struck appellant. One assailant successfully fled the scene and was not apprehended. The other blow was struck by appellant, while the co-defendant Jones removed the money from the complainant's pocket. (Tr. 36).

Appellant suggests that the record is not clear in showing that he actually hit the complainant. Campbell, on direct examination, was questioned as follows:

> By Mr. Sidman (the prosecutor):
>
> Q. Did you see who knocked Mr. Peay down?
> A. Yes, I did.
> Q. Who was that?
> A. The other fellow, which is not here, was the first, one, and *this* was the second one.
> Q. Did you see whether or not Mr. Jones hit Mr. Peay?
> A. No.
> Q. Did you see, or did he?
> A. He did not hit him. (Emphasis supplied) (Tr. 35)

Appellant suggests that this reference was vague and did not necessarily refer to him. He suggests that the witness was perhaps referring to someone in the courtroom at large when saying "this was the second one" who struck the complainant (Br. 25, 26). The finger of accusation is unmistakably pointing to appellant. The witness specifically stated that Peay was struck twice. Only once by the culprit who was not apprehended. Co-defendant Jones, in this testimony, was pictured as not having struck any blows. Therefore, the second hitting was by appellant. Indeed, the witness Campbell pointed to both appellant and co-defendant as having taken part in the assault (Tr. 34). The trial court, in denying a motion for a judgment of acquittal, also recalled that one of the witnesses had described appellant as striking the victim (Tr. 68). The prosecutor had a similar recollection (Tr. 97). They were not exercising faulty memories.

By this testimony appellant's involvment is clear and more than adequate to support a jury verdict of guilty. Under *Glasser* v. *United States*, 315 U.S. 60 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229 (1947), *cert. denied*, 331 U.S. 837; *Morton* v. *United States*, 79 U.S. App. D.C. 329, 147 F.2d 28 (1945), *cert. denied*, 324 U.S. 875, an appellate court, in testing the legal sufficiency of the evidence to support a jury verdict of guilty, must view the evidence in the light most favorable to the Government. Though the testimony of the other prosecution witnesses varied somewhat on who struck the blows, any discrepancies in the testimony were resolved by the jury, exercising its power to determine credibility and draw justifiable inference of facts. Here, the attack was sudden: each witness had a different vantage point and was not prepared for minute observation. The jury could certainly find that on this fact, whether appellant struck a blow, the witness Campbell was correct.

Nor is appellant's involvement and guilt dependent on an actual striking of the victim. As an aider and abettor, which allows him to be charged as a principal (22 D.C.C. § 105), the jury had sufficient evidence to find him guilty. Two witnesses described three culprits arriving on the scene together (Tr. 32, 33, 44). Each of the three performed a function: striking the complainant to the ground, removing the money, acting as a look-out or a reserve force in the event of a struggle by the victim (Tr. 33-35, 43-46). Appellant, at the very least, served in the third capacity. He arrived on the scene with the others, was standing by—at the feet of the fallen complainant—while the money was removed, and made a get-away with co-defendant Jones (Tr. 36, 37). Minutes later, appellant was in possession of the stolen money, six (6) one dollar bills[1] (Tr. 52-56).

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[1] On the grounds of an illegal arrest and subsequent unlawful search, appellant, prior to trial, sought to suppress the six one dollar bills seized from his person. A hearing was held and the motion denied (November 18, 1963-Tr. 1-20). After the evidence

Appellant admitted his presence at the scene. He also testified that after co-defendant Jones bumped into complaint Peay, accidentally, he continued walking. Further, that he did not see Jones take any money, though two witnesses saw appellant and Jones walking down the street counting the ill-gotten gain (Tr. 36-37, 47-48).

Thus, even assuming *arguendo* that appellant struck no blows, appellant's role in the commission of the crime: as a look-out, reserve force, or as a source of encouragement, was sufficient to implicate him as an aider and abettor in the commission of the crime. *Turberville* v.

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was admitted a motion for a mistrial, renewing the same objections, was made and again denied (Tr. 70).

Now, for the first time, appellant raises new objections as to the admissibility of these dollar bills into evidence and appears to suggest that the seized money was irrelevant in proving appellant's guilt as a principal or aider and abettor in the commission of the robbery. He abandons all arguments as to the propriety of the search. Appellant argues that inasmuch as the testimony indicates he received the money from co-defendant Jones after its removal from the complainant's pocket, the bills are only relevant in proving guilt as an accessory after the fact, a crime with which he was not charged. Objections to the receipt of evidence, along with the statement of reasons for such objections, should be made before the trial court, otherwise an appellate court will not review the admissibility. *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1962); See, *Gray* v. *United States*, 114 U.S. App. D.C. 77, 311 F.2d 126 (1962); *Williams* v. *United States*, 113 U.S. App. D.C. 7, 9, 303 F.2d 772, 774, *cert. denied*, 369 U.S. 875 (1962).

Moreover, the dollar bills seized from appellant shortly after the commission of the criminal act are quite relevant to prove his guilt either as a principal or as an aider and abettor in the commission of the crime. Appellant's role in the robbery is underscored through his possession of these funds shortly after the taking from the victim. Indeed, unexplained possession of recently stolen goods is sufficient to support a verdict of guilty of larceny. *Wright* v. *United States*, 89 U.S. App. D.C. 70, 189 F.2d 699 (1951); *Edwards* v. *United States*, 78 U.S. App. D.C. 226, 139 F.2d 365 (1943), *cert. denied*, 321 U.S. 769; *Tractenberg* v. *United States*, 53 App. D.C. 396, 293 Fed. 476 (1923). "Housebreaking, robbery and burglarly are merely aggravated forms of larceny and there is no reason why evidence competent in one case should not be competent, also, in the others." *Edwards* v. *United States*, *supra*, 78 U.S. App. D.C. at 229, 139 F.2d at 368. The evidence was properly admitted.

United States, 112 U.S. App. D.C. 400, 303 F.2d 411 (1962); *Polen* v. *United States*, 41 App. D.C. 4 (D.C. Cir. 1913); *Rogers* v. *United States*, 174 A.2d 356 (D.C. Mun. App. 1961).

Appellant's activities clearly fall within the description of "aider and abettor" given by this Court in *Turberville* v. *United States*, 112 U.S. App. D.C. 400, 402-403, 303 F.2d 411, 413-414 (1962), *cert. denied*, 370 U.S. 946, which stated,

> "All those who assemble themselves together with an intent to commit a wrongful act, the execution whereof make probable in the nature of things a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible . . . for the acts of each, if done in pursuance of, or as incidential to, the common design."

Either as a principal or as an aider and abettor appellant was properly convicted.

II. The trial court's instructions to the jury were proper. (Tr. 97-98, 130).

(a) *The recollection of the jury governs deliberation of the case.*

During closing argument the prosecutor recalled that a witness had testified that appellant struck complainant Peay during the commission of the robbery. Defense counsel interrupted and suggested that no such testimony was given. The court replied, "Ladies and gentlemen, that is not my recollection. My recollection was as stated by the District Attorney." (Tr. 97-98.) Appellant argues that the court committed prejudicial error by making such a remark (Br. 37).

The recollection of the court and the prosecutor was a correct reflection of the testimony. One witness, Joseph Campbell, did testify that appellant struck the complainant. (See Argument I, *supra*). The court not only correctly heard the testimony but, in addition, had the

opportunity to observe physical motions, such as pointing to appellant, which would clarify any possible vagueness in the testimony.

Even assuming the recollection of both the court and prosecutor was in error, no prejudicial error exists. Appellant, at trial, did not move for a mistrial, or ask for any instructions on this point. Further, the trial court, at some length and immediately after the colloquy concerning recollection of an item of testimony, instructed the jury that neither the court's nor counsel's recollection controlled; rather, the jury's recollection governed its deliberations. Slight deviations in testimony are not grounds for reversal where proper instructions to the jury are given. See, *Karikas* v. *United States*, 111 U.S. App. D.C. 312, 315, 296 F.2d 434, 437 (1961), *cert. denied*, 372 U.S. 919; *cf. Wallace* v. *United States*, 281 F.2d 656, 667 (4th Cir. 1960). Such instructions are not an empty magical abracadabra formula invoked to exorcise some imaginary demons. See, *Delli Paoli* v. *United States*, 352 U.S. 232 (1957). Instead the instructions are vital, allowing the jury to know that because the memories of judges and counsel have flaws, the collective recollection of twelve jurors, each having had the opportunity to observe and hear every twitch and echo in the courtroom, is controlling.

(b) ***The jury was fully instructed on the role of an aider and abettor in the commission of a crime.***

At trial appellant voiced no dissatisfaction with the court's instructions and, when specifically requested, had no additional instructions to offer (Tr. 130). Failure to object at trial to the instructions, forecloses review on appeal (See Rule 30, Fed. R. Crim. P.), absent a showing of plain error. *Dukes* v. *United States*, 107 U.S. App. D.C. 382, 278 F.2d 262 (1960); *Ruffin* v. *United States*, 106 U.S. App. D.C. 97, 269 F.2d 544 (1959), *cert. denied*, 361 U.S. 865; *Moore* v. *United States*, 104 U.S. App. D.C. 327, 262 F.2d 216 (1958).

Appellant suggests that the court did not make clear that "acting in concert" meant "acting in concert in the commission of the crime (Br. 34)." The language of the instruction, taken as a whole, was clear and did not suggest that innocent action in concert was criminal.[2]

In *Coleman* v. *United States*, 114 U.S. App. D.C. 185 313 F.2d 576 (1962), this Court upheld instructions where the trial court "did not instruct specifically on 'common purpose', but the general instructions on aiding and abetting were adequate and (defense counsel) did not object to them." *Barsky* v. *United States*, 83 U.S. App. D.C. 127, 138, 167 F.2d 241, 252 (1948), *cert. denied*, 334 U.S. 843. See *Turberville* v. *United States*, 112 U.S. App. D.C. 400, 402-403, 303 F.2d 411, 413-414 (1962), *cert. denied*, 370 U.S. 946.

In *Grant* v. *United States*, 291 F.2d 746 (9th Cir. 1961), the Ninth Circuit found instructions sufficient which told the jury that all person who "aid and abet in the commission of a crime are principals" and "in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence." The court added, "In such we cannot believe that the jury understood that a person who innocently aids in the commission of an offense may be found guilty. The jury, if possessed of common sense, could not have given the word "aid" its extremely narrow and literal sense." 291 F.2d at 749.

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[2] The trial court's instructions, in pertinent part, states:

> If the other essential elements of the crime have been proven beyond a reasonable doubt, it is not necessary for the Government to prove that each defendant himself actually committed the offense, as long as the Government has proved beyond a reasonable doubt that the defendant was acting in concert with one or more persons who did commit the offense.
>
> In other words, under the law a person who advises or connives at any criminal offense, or aids and abets the principal offender is himself as guilty as the principal offender. Mere physical presence is not enough. To contitute an aider and abettor it is essential that the aider and abettor share in the criminal intent with the party who actually commits the crime. (Tr. 129).

The instructions in the instant case were clear and precise, fully meeting the applicable requirements. Neither plain error affecting substantial rights nor any error is present in these instructions.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,377

MELVIN LOMAX,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from a Judgment
of the United States District
Court for the District of
Columbia

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR APPELLANT

In its brief appellee argues (1) that the record shows that appellant struck the complainant, (2) that even if appellant had not struct the complainant, the jury was entitled to infer from other evidence that appellant otherwise aided and abetted the robbery committed by a codefendant, and (3) that the court's instructions were proper or, in the alternative, were not

the subject of timely objections by appellant. Appellant and appellee clearly join issue on the first three assignments of error raised in appellant's brief. In this reply brief, appellant reasserts the fourth point validly raised by its main brief, and submits that the refusal to suppress as evidence the six one-dollar bills seized from appellant, or the court's refusal to declare a mistrial, also constitute reasons for reversal.

(1) INSUFFICIENCY OF EVIDENCE

A. Lack of Record Evidence of Striking

The dispute on this issue is not one of interpreting conflicting evidence; it is rather whether any evidence, upon which the jury could have concluded that appellant struck the complainant, was adduced. Thus, the case should not have gone to the jury at all.

Appellee now claims that the "finger of accusation" unmistakably pointed to the appellant (Br. 6). The record does not show this to be a fact. If appellee's figurative expression "finger of accusation" is to be reduced to reality, the record should have shown in parenthesis that when the witness testified "The other fellow, which is not here, was the first one [to strike the complainant] and this was the second one" he pointed

to one of the defendants. The record does not disclose that the complainant pointed at anyone. The reporter did not fail elsewhere to insert these essential parenthetical remarks in the record where such identification by "the accusing finger" was attempted.[1/]

In a case upon which appellee chiefly relies, it is contended that the record did not originally show that the indictment was returned in open court and that the judge's subsequent corrective notation in the record, made a month after the indictment, could not cure that fatal defect. Glasser v. United States, 315 U.S. 60, 65-66. Thus, it seems, appellant's argument would be different here had the trial judge, upon reading the transcript of the record before its release (as is his habit), ordered the insertion of the notation "(Witness pointed to [name of person])" thereby supplying the missing "accusing finger" to the disputed critical testimony. However, without such record evidence, it cannot be concluded on appeal that

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1/ Lack of identification by the other two means employed during the trial -- by name or apparel -- was discussed in the appellant's main brief, p. 27.

there was any evidence showing that appellant hit the complainant. The rule that on appeal the record must be read in the light most favorable to the prosecution refers to matters within the confines of the record. It does not mean that something else can be read into record on appeal. This is particularly true when the assignment of error, correctly preserved for appeal by timely motions, challenges the sufficiency of the evidence to support the conviction.

B. Lack of Other Evidence of Aiding and Abetting

The evidence, read in the worst light to appellant, shows the following: Lomax, appellant herein, met Jones and the two of them started walking together (perhaps together with a third unknown person). Half a block later Jones bumped into Mr. Peay, the complaining witness, who was walking in the opposite direction, and Jones removed some money from Peay's pocket. Peay claims it was six one-dollar bills. Lomax was present but did nothing. Jones and Lomax then walked away from the scene; Jones was counting some money. A couple of blocks from the scene, minutes later, Jones and Lomax were apprehended. Lomax had six one-dollar bills and some change in his

possession.[1/]

The prosecution now claims that even if Lomax did not hit the complaining witness, the jury was entitled to convict Lomax as an aider and abettor because (i) Lomax arrived at the scene together with the perpetrator of the crime, (ii) Lomax stood by while the crime was being committed, and (iii) minutes after the crime Lomax was found in possession of the stolen money. Appellant submits that none of these facts even if assumed as proven could have justified a reasonable mind fairly to conclude beyond a reasonable doubt that Lomax aided and abetted the commission of robbery.

(i) Walking With The Perpetrator

For human beings to walk together is not the kind of suspicious activity from which mens rea can be assumed.

1/ Appellee, in colorful prose, claims that three men swooped down the street, alighted on a victim, knocked him down, twisted his arm, and robbed him of six one-dollar bills (Br. 5). The record, of course, does not support this use of plurals. Appellant herein did no swooping, alighting, knocking, twisting or robbing. The government's theory was that he aided and abetted Jones and that, therefore, he can be charged and convicted as a principal. If picturesque dramatization of facts is to portray the truth, the record would rather permit the statement that two men strolled down the street, one of them suddenly pealed off and bumped into a stranger, took his money, and then rejoined his walking companion to whom, upon the policeman's call of "Halt," he may have slipped the stolen money.

Walking together in a city street, in broad daylight, at 11 o'clock in the morning, does not make one an aider and abettor of his companion. The crime committed by Jones on the spur of the moment -- and there is nothing from which advance planning could be rationally deduced -- was not the natural and probable result of Lomax's acquiescence to walk with Jones. Even association with known criminals -- and Lomax could not have known that Jones was crime-bent at the time -- is no crime by itself. Davis v. United States, 107 U.S. App. D.C. 76, 274 F.2d 585 (D.C. Cir. 1960), cert. den. 363 U.S. 806; Aikens v. United States, 98 U.S. App. D.C. 66, 232 F.2d 66 (D.C. Cir. 1956); United States v. Garguilo, 310 F.2d 249 (2d Cir. 1962); Evans v. United States, 257 F.2d 121, 126 (9th Cir. 1958) cert. den. 35 U.S. 866; Tripp v. United States, 295 F.2d 418, 426 (10th Cir. 1961).

Turberville v. United States, 112 U.S. App. D.C. 400, 303 F.2d 411 (D.C. Cir. 1962) cert. den. 370 U.S. 946, on which appellee relies, is inapposite. Here three co-defendants walked in a group armed with lethal instruments with the avowed purpose, clearly expressed by one, to find and "to get Tucker." Tucker was observed fleeing and hiding from his pursuers. The three defendants later viciously

assualted three victims, who claimed to know nothing of Tucker's whereabouts. One of the victims died. Under the circumstances, this Court held that the fact that the victim beaten by the other two defendants died and that the man beaten and burned, or that the woman who was sexually assualted by Appellant Simpson, did not die "does not lessen Simpson's liability for advising, inciting, conniving, aiding and abetting in the homicide." 112 U.S. App. D.C. at 402, 303 F.2d at 413.

In Coleman v. United States, 114 U.S. App. D.C. 185, 313 F.2d 576 (D.C. Cir. 1962), upon which case appellee chiefly relies, four of the five co-defendants (including Appellant Coleman) stole a car, drove to and gathered at the house of the fifth defendant's sister, drank together, and then drove off in the evening at about the time when shops were closing. Reaching a store which was about to close, they parked the stolen car. When the storekeeper and his wife left the store, three defendants alighted from the car; one grabbed the wife's handbag and the other (not Coleman) shot the storekeeper dead with a pistol. On appeal this Court held:[1/]

1/ 114 U.S. App. D.C. at 187, 313 F.2d at 578. The case was reversed for other reasons.

> The jury could reasonably regard the shooting as incidental to the common design of robbery. The court did not instruct specifically on "common purpose," but the general instructions on aiding and abetting were adequate and counsel for Coleman did not object to them.

The assembly "with an intent to commit a wrongful act" was clearly proven in each of the above cases. The intent with which the defendants gathered must be inferred from the evidence of other facts; mere association, without a proven criminal intent, is not sufficient evidence solely because one of a group commits a crime.

There is no evidence in this case that Lomax and Jones were roaming the streets armed and out "to get" someone, as was the case in Turberville. Nor is there any evidence of a joint previous crime, of a planning session, and a steakout, as in Coleman. There is no evidence that Lomax even knew that Jones was to commit a crime and, due to the casual swiftness with which Jones took advantage of a passing pedestrian who happened to come along, it may be that even Jones himself did not know in advance that he would commit a crime in the next seconds. In any event, there is no evidence which would color the innocent

act of Lomax in walking together with Jones from which the jury was entitled to infer, without a reasonable doubt, that they were walking down the street as part of a common design to commit a wrongful act.

(ii) Presence

As was explained at some length in appellant's main brief (pp. 29-31, 34-37), mere presence at the crime, even when coupled with the knowledge that a crime is committed, but without some affirmative act to forward the crime, which would render a person a common law "principal in the second degree," and absent some prior connivance or agreement, which would render a person a common law "accessory before the fact" or "conspirator," does not render the passive witness an aider and abettor. United States v. Garguilo, supra; Davis v. United States, supra; Aikens v. United States, supra. See also, Johnson v. United States, 195 F.2d 673, 675-676 (8th Cir. 1952) where the court stated as follows:

> As the term "aiding and abetting" implies, it assumes some participation in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed. It implies some conduct of an affirmative nature and mere negative acquiescence is not sufficient. Morei v. United States, 6 Cir., 127 F.2d 827; United States v. Dellaro, 2 Cir., 99 F.2d 781. In fact, it has been held that the mere fact that one is present at the scene of a crime, even though he may be in sympathy with the person committing it, will not render him an aider and abetter. The rule is stated in the article on Criminal Law, 22 C.J.S., §88b(3), page 160, as follows: "The mere fact that one present at the scene of a crime may be in sympathy with the person committing the same

> or may approve of his act will not render the former an aider or abettor. So, also, the mere fact that one present may negatively consent to the commission of the felony will not render him a principal in the second degree, and instructions using the word 'consent' have frequently been held erroneous." (Emphasis supplied)

Yet, the prosecution contends that the passive presence of Lomax was in the role of a lookout or reserve force or a source of encouragement (Appellee's Brief, pp. 7-8). The cases cited in support of this proposition, however, do not justify that statement. In Emberville, as shown supra, the aider and abettor himself actively participated in a cruel assault on two of the three victims. In Rogers v. United States, 174 A.2d 356 (D.C. Mun.App. 1961), the assailant, after his illicit "proposition" made to the victim in a park at night was rejected, left the victim but shortly reappeared with two more men. The assailant then hit the victim, demanded his money, shoved him on a park bench and searched his pockets in the presence of these men and then the three of them fled. While there was no evidence that appellant,one of the two men hailed by the assailant, also hit or searched the victim, the court upheld his conviction for assault on the theory that he was an aider and abettor. The reserve status of the accomplices in this case could certainly be

inferred from the evidence. Polen v. United States, 41 App. D.C. 4 (D.C.Cir. 1913), merely holds that an indictment charging assault by three men by a brick held in the hand of one of them--to which appellant demurred--was not defective.

But appellant does not contend that presence at the scene of the crime is always innocent. Other facts and circumstances may justifiably implicate the criminal's companion, such as when the companion is hailed as an aid to the crime and he willingly appears (Rogers v. United States, supra), or when prior assembly for the purpose of committing a wrongful act was shown, when the getaway vehicle is held ready for escape, when the silent presence is accompanied by the manning of some lethal instrument, or by a menacing demeanor. Nor does appellant necessarily contend that the evidence that a codefendant was in the company of the one who committed the crime and was present at the scene thereof is not admissible evidence. The point is that where no circumstances are present other than mere presence, from which aiding and abetting can be inferred, the jury is not entitled to conclude, without a reasonable doubt, that the silent and passive onlooker was an aider and abettor of the criminal.

(iii) Possession of Stolen Goods

Unexplained possession of stolen goods has been admissible to show either that the possessor took the goods (if charged with their theft) or that the possessor received the goods knowing that they were stolen (if charged with receiving stolen goods). When charged with stealing, the unexplained possession of the stolen goods is considered circumstantial evidence of only one element of the offense: taking.

Thus, presuming that the money found in possession of appellant was the money taken from the complainant, and further assuming that its possession was unexplained, the jury may have been entitled to infer therefrom that appellant took the money and completed the other elements of the common law crime of larceny or some other proven aggravated form thereof. However, since the testimony of Peay and of the two eyewitnesses, introduced by the prosecution, showed that not the appellant but another defendant, Jones, took the money from Peay, appellant's possession thereof is no longer "unexplained" insofar as the element of taking is concerned.[1/] In this case the otherwise permissible

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1/ Cf. McAdams v. United States, 74 F.2d 37, 40 (8th Cir. 1934): "While possession of recently stolen property may call for an explanation, it is not necessary that the explanation come from the defendant, since it may arise from the evidence introduced by the government itself. . ."

inference was rebutted by the prosecution's own evidence and the jury was no longer entitled to infer that appellant took the money from the complainant. Nor was the jury entitled to speculate that appellant may have committed some other elements of the offense, since possession, under the circumstances, did not even prove the threshold presumption of taking. Thus, appellant could have been convicted as an aider and abettor only if his commission of some element other than taking and by proof other than possession was established.

Thus, while the proof of larceny, by unexplained possession of stolen goods also extends to aggravated forms of larceny, as appellee points out in its brief (p. 8, footnote), it does not necessarily extend to the proof of aiding and abetting larceny. This is particularly true where, as in the instant case, the prosecution does not claim that the aider and abettor actually took the stolen goods and, in fact, its own evidence negates that possibility.

The other inference, that appellant received the money from Jones knowing that it was solen, applies to the charge of receiving stolen goods, an entirely separate crime with which appellant was not charged. Nor was appellant charged as an accessory after the fact. And, as the court held in

Cleaver v. United States, 238 F.2d 766, 770 (10th Cir.1956)[1]:

> . . .an accessory after the fact cannot be convicted of a conspiracy to commit a crime where the proof demonstrates only that he helped dispose of stolen goods after the crime was committed. Although one who causes an act to be done, aids, abets, induces or procures its commission is properly prosecuted as a principal, 18 U.S.C.A. §2, Congress has afforded different punishment for one who is an accessory after the fact, 18 U.S.C.A. §3.

1/ In this holding the 10th Circuit relied on the Supreme Court's decision in Bollenbach v. United States, 326 U.S. 607 (1946) where a conviction for conspiring to transport securities in interstate commerce was reversed because the trial judge's charge to a deadlocked jury stated that "possession of stolen property in another state than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but such presumption is subject to explanation and must be considered with all testimony in the case." (326 U.S. at 609.)

Insofar as Bollenbach held that unexplained possession of goods stolen in another state does not raise an additional inference that the possessor also transported them in interstate commerce, it seems to violate the old rule concerning the inferences to be drawn from unexplained possession. Subsequent decisions did not regard Bollenbach as negating an inference of interstate transportation under such circumstances. E.g., Bray v. United States, 113 U.S.App.D.C. 136, 306 F.2d 743 (1962) and cases cited therein. But these cases distinguishing Bollenbach merely state, in essence, that one found in possession of goods stolen in another state must rebut both the presumption that he stole the goods and the separate presumption that he transported them interstate. Thus, the showing that someone else stole the goods does not clear the possessor from the charge that he may have conspired with the taker after the theft to transport the goods interstate, it clears the possessor of the theft. These cases do not disturb the principle that the jury cannot infer from the fact that one received stolen goods from the proven thief that the receiver must also have encouraged, aided, abetted or procured the commission of the theft before or while the crime was committed.

(2) ERRONEOUS INSTRUCTIONS

Appellant's main brief argued that even if there were some evidence on which the jury could possibly have convicted appellant, it could do so only upon appropriate instructions. However, under the circumstances of the case, the instructions were incomplete and the court's remarks were prejudicial.

Appellee now contends that the language of the instruction taken as a whole, "did not suggest that innocent action in concert was criminal." (Brief, p. 11). Appellant's point, however, was that the language permitted a conviction of appellant, as an aider and abettor, even if the jury believed that appellant did nothing, but was merely a spectator of the crime committed by Jones.[1] The point in United States v. Garguilo, 310 F. 2d 249 (2d Cir. 1962) is that while instructions which "in a less doubtful case," would be adequate, may be fatally erroneous where, if the evidence passed the test of sufficiency, it did so "only by a hair's breadth." Yet in that case (in sharp contrast with the instant one) there was evidence of repeated, close association over a

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1/ ". . . in the face of the misdirection and in the circumstances of this case, we cannot assume that the lay triers of the fact were so well informed upon the law or that they disregarded the permission expressly given to ignore that vital difference." Kotteakos v. United States, 328 U.S. 750, 769 (1946)

period of time between the principal and the alleged aider and abettor.

The cases cited by appellee to show the adequacy of less precise instructions (Brief, p. 11) merely represent cases where the testimony, if believed by the jury, unquestionably showed that whatever concerted action there may have been between the aider and abettor and the principal, it was in the advancement of a criminal venture. 1/

That the safeguards afforded to a defendant must be meticulously observed, particularly in a weak case, is also supported by Glasser v. United States, 315 U.S. 60, upon which appellee also relies, 2/ because in such cases "the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which

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1/ However, Grant v. United States, 291 F. 2d 746, 749 (9th Cir. 1961), cited on page 11 of appellee's brief, and relied on by appellee, does not contain the quoted language concerning reliance on the common sense of the jury. Therefore, we are not in a position to address ourselves to the facts of the case which may contain that language.

2/ In that case, the joint representation of alleged conspirators by the same counsel raised a question whether one of the defendants was deprived of assistance of counsel.

swung the scales toward guilt." (315 U.S. at 67).

These "delicate scales" were swung when the court in the instant case, despite defense counsel's vigorous and repeated objection to the prosecutor's assertion that appellant also struck the complainant, the court volunteered that its recollection also supported the prosecutor. As was shown, the record does not prove the court's damaging recollection to be correct. And if it were held that, as suggested by appellee, the question was one to the jury, it was grossly prejudicial thus to help resolve the jury's justifiably reasonable doubt about the disputed critical fact. Quercia v. United States, 289 U.S. 466 (1933); Billeci v. United States, 87 U.S. App. D.C. 274, 184 F. 2d 394 (D.C. Cir. 1950).

Contrary to appellee's understanding (Appellee's Brief p. 10), appellant's trial counsel did move for a mistrial and objected to the prejudicial remarks (Tr. 68-71, 97). Having made his point, he was under no obligation to repeat his position throughout every step of the trial or to state cumulative reasons for his motions. In any event, the insufficient charge to the jury coupled with the prejudicial remarks constituted error under Rule 52(b) of the Federal Rules of Criminal

Procedure, which may be noticed by this court. Payton v. United States, 96 U.S. App. D. C. 1, 222 F. 2d 794 (D.C. Cir. 1955). As was stated in United States v. Garguilo, supra, 310 F. 2d at 254-255:

> . . . Reading the entire charge, we cannot overcome a fear that the judge, quite unwittingly and simply by emphasis, may have led the jury to believe that a finding of presence and knowledge on the part of Macchia was enough for conviction. True, there is much in the charge that would argue against this. Turning to the case against Macchia, the judge began by stating the law as to aiding and abetting with entire correctness. However, when he came to apply these principles to the facts, very nearly the whole of his comment, and a vivid illustration that he used, related solely to the issue of "conscious, intelligent awareness of what was going on."[footnote omitted] . . . never were the jurors told in plain words that mere presence and guilty knowledge on the part of Macchia would not suffice unless they were also convinced beyond a reasonable doubt that Macchia was doing something to forward the crime -- that he was a participant rather than merely a knowing spectator. In the usual case we should not think of finding reversible error in such a charge when there was no objection, or perhaps even if there had been. However, in the exceptional circumstances here presented, and in the light of our powers under 28 U.S.C. §2106 and F.R. Crim. Proc. 52(b), we believe that the interest of justice as between the Government and Macchia will be best served by reversal . . . (Emphasis supplied).